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In The

Supreme Court of the United States

October Term, 1977

No. 77-728

THE SCHOOL DISTRICT OF OMAHA,
STATE OF NEBRASKA, et al.,

Petitioners,

vs.

UNITED STATES OF AMERICA,
and
NELLIE MAE WEBB, et al.,

Respondents.

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

In response to the Briefs in Opposition of the Respondents, the Petitioners ask this Court to consider the following:

ARGUMENT

The Petition for Writ of Certiorari presents one question of vital national significance for this Court: whether the plaintiff in a school desegregation case meets its burden of proof on segregative intent under *Village of Arlington Heights v. Metropolitan Housing Authority,* 429 U. S. 252 (1977), simply by showing that one of the "natural and foreseeable" effects of the actions of a school district was to "create or maintain" racially imbalanced schools.

The Respondents, in urging that further review of the issue raised by this case is unnecessary, err in several respects:

A. The Elements of the Foreseeable Effects Standard are Misstated by the Respondent United States.

The Respondent United States attempts to justify the Court of Appeals' decision on remand by urging the validity of a legal standard other than that in fact relied on by the Court of Appeals. The Respondent United States asserts that the foreseeable effects standard used by the Court of Appeals has the following essential elements:

(a) The plaintiff's prima facie case consists of proof that:

(i) the school district engaged in policies which deviated from normal school district policies; and

(ii) the foreseeable effect of these policies was to create more racial separation than would have resulted from normal school district policies.

(b) Once the plaintiff establishes its prima facie case, the burden of proof shifts to the school district to demonstrate that the questioned actions were a consistent and resolute application of racially neutral policies.

Whatever the plausibility of this standard, it is clearly not the one utilized by the Court of Appeals. Rather, the standard utilized by the Court of Appeals consists of the following elements:

(a) The plaintiff establishes a prima facie case by proof that the school district engaged in actions which

had as one of their natural and foreseeable effects the creation or maintenance of racial imbalance in the schools; and

(b) Once the plaintiff establishes its prima facie case, the burden of proof shifts to the school district to show that segregative intent was not one of the purposes behind its challenged actions (App. pp. 107-108).

The Court of Appeals standard does not place any burden on the plaintiff to show that the school district policies in question deviated from normal policies or that such policies produced more racial separation than normal policies. Nor does it permit the school district to rebut the plaintiff's prima facie case in any fashion other than by proving the negative proposition that not one of its purposes was intent to segregate.

B. The Foreseeable Effects Standard Is Inconsistent With Village of Arlington Heights.

1. Although both of the Respondents offer conclusory statements that there is no inconsistency between the Court of Appeals' action on remand and this Court's decision in *Village of Arlington Heights,* they both avoid directly addressing the arguments raised by the Petitioners, thereby indicating that there is in fact an irreconcilable inconsistency.

The Respondent United States asserts there is no inconsistency with *Village of Arlington Heights* because the Court of Appeals standard established that the plaintiff in a school desegregation case need not prove that school district actions rested solely on a racially discriminatory

purpose and that intent to segregate may often be inferred from the totality of the circumstances. But none of the arguments raised in the Petition asserted any inconsistency with *Village of Arlington Heights* on either of these two grounds. Furthermore, the standard utilized by the District Court in determining that the School District did not engage in intentional segregation readily acknowledged each of these two principles. Nevertheless, the Court of Appeals found that the District Court erred as a matter of law.

The essential inconsistency, as detailed in the Petition (See Pet. pp. 14-17), between *Village of Arlington Heights* and the Court of Appeals standard is as follows:

> (a) The standard permits a prima facie case of intentional segregation to be established from mere proof that school district actions had as one of their foreseeable effects some racial imbalance in the schools, whereas *Village of Arlington Heights* holds that proof of foreseeable effects of actions is merely one of the elements of a prima facie case of intent and does not, absent extreme circumstances, establish a prima facie case; and
>
> (b) The standard places on the defendant school district the burden of rebutting this prima facie case by establishing affirmatively that not one of the purposes behind its actions was purpose or intent to segregate, whereas *Village of Arlington Heights* holds that a defendant may rebut a prima facie case of intentional discrimination even though one of its purposes was to discriminate if it can prove it would have acted in the same manner had race not been a purpose motivating the action.

Neither Respondent directly addressed the Petitioners' arguments on these two patent inconsistencies.

Moreover, these two inconsistencies radically restrict the proper role of the trier of fact in discrimination cases under the Fourteenth Amendment. Instead of permitting the trier of fact to consider the foreseeable effects of actions as one factor to be weighed in deciding whether the defendant acted with discriminatory intent, they make the foreseeable effects determinative of intent and do not permit the trier of fact the discretion to weigh other relevant factors as specified in *Village of Arlington Heights.*

Therefore, the inconsistency with *Village of Arlington Heights* is obvious.

2. The Respondent Intervenors cite several cases for the tort principle that persons are presumed to intend the natural and foreseeable consequences of their acts. None of these cases deal in any way with the appropriateness of the foreseeable effects standard, which utilizes and expands this tort principle, in determining segregative intent under the Fourteenth Amendment. Nor do they obviate the necessity for further review of this case because they do not resolve the question of whether the foreseeable effects standard is consistent with *Village of Arlington Heights,* particularly in the context of student assignment decisions in school districts with racially imbalanced neighborhoods, like the School District of Omaha.

In such school districts, use of a student assignment policy essentially based on the neighborhood school concept will have as one of its foreseeable and, indeed, inevitable effects racial imbalance in the schools. Thus, under the tort principle as applied by the Court of Ap-

peals, one of the school district's purposes would of necessity be intent to segregate. The school district could not rebut this presumed intent under the foreseeable effects standard since it could not prove that none of its purposes was to segregate. Therefore, under this standard, the school district must be found in violation of the Fourteenth Amendment.

The introduction of the tort principle into constitutional adjudication thus imposes on such school districts a constitutional duty to integrate. Neither *Village of Arlington Heights* nor any other decision of this Court imposes such a duty. Therefore, the tort principle for determining intent is inappropriate in school desegregation cases, whatever its validity in other contexts.

C. The Foreseeable Effects Standard Is Essential To The Result Reached By The Court Of Appeals.

1. The Respondent Intervenors argue that the Court of Appeals' decision that the School District intentionally segregated its students did not rest in any substantial way on the foreseeable effects standard. However, the Court of Appeals' opinion on remand explicitly states that it reached its decision solely because of the foreseeable effects standard (App. p. 177). The Court of Appeals did not, on remand, review the evidence in light of the several factors stated by this Court in *Village of Arlington Heights* for determining the presence of intentional segregation. Therefore, if this argument of the Respondent Intervenors is to be accepted, the Court of Appeals' own stated reason for its decision must be ignored.

The Court of Appeals' exclusive reliance on the foreseeable effects standard on remand is a repetition of that Court's two earlier opinions in this case. Its reversal of the District Court's "comprehensive opinion", which "extensively reviewed the evidence",[1] rested entirely on its holding that the District Court erred as a matter of law in not recognizing and applying the foreseeable effects standard. No review of the record under Rule 52 of the Federal Rules of Civil Procedure has ever been made by the Court of Appeals. Therefore, the validity of the foreseeable effects standard is the critical issue presented by this case because the Court of Appeals itself found that standard essential to sustain the result it reached.

2. The Respondent Intervenors argue that the Court of Appeals, in its original opinion, in fact relied upon the types of evidence specified by this Court in *Village of Arlington Heights*. However, such evidence was not utilized by the Court of Appeals on remand, and any analysis made by the Court of Appeals in its original opinion of the types of evidence specified in *Village of Arlington Heights* was done solely within the confines of the foreseeable effects standard and the burdens of proof required by that standard, which are clearly inconsistent with the burdens of proof stated in *Village of Arlington Heights*.

3. The Respondent Intervenors urge that any inconsistency between the foreseeable effects standard and this Court's holding in *Village of Arlington Heights* is only of academic interest in this case because the record war-

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1. *School District of Omaha v. United States*, — U. S. —, 97 S. Ct. 2905 (1977).

rants a finding of intentional segregation if the criteria of *Village of Arlington Heights* and Rule 52 of the Federal Rules of Civil Procedure were applied to it.

In support of this proposition, the Respondent Intervenors recite evidence in the record from their perspective without any regard to the weight or probative force of such evidence and without any regard to conflicting and more probative evidence in the record that leads to contrary conclusions. Moreover, this exercise of the Respondent Intervenors overlooks one essential reality of this entire, protracted litigation: the District Court, using a standard of law substantially identical to the one in *Village of Arlington Heights*, correctly found the facts to be otherwise than the Respondents alleged.

Furthermore, the Respondent Intervenors' argument fails to take account of the critical fact that the Court of Appeals reversed the District Court *solely* because it held that the District Court erred as a matter of law in not utilizing the foreseeable effects standard. Moreover, the Respondent Intervenors specifically urged Rule 52 review under *Village of Arlington Heights* in the Court of Appeals on remand, but the Court of Appeals reasserted the validity of the foreseeable effects standard and emphasized it as essential for finding intentional segregation based on the record in this case. Therefore, the picture of the record advanced by the Respondent Intervenors is simply not persuasive because their perspective on the facts has not been adopted by either court below. Thus, the finding of intentional segregation by the Court of Appeals stands or falls with the foreseeable effects standard.

4. The Respondent Intervenors argue that the evidence concerning School District faculty assignment policies is particularly probative of the School District's overall segregative intent. However, in so arguing, the Respondent Intervenors rely upon a few isolated incidents described from an advocate's perspective. The District Court reviewed this same evidence together with other relevant evidence, all in light of a standard clearly consistent with the one in *Village of Arlington Heights*. Although it did find that the School District discriminated in faculty assignment prior to the early 1960's, the District Court held that any such discrimination ended at that time (App. p. 90).

Moreover, the District Court found no probative evidence of discrimination in hiring of black faculty before or after the early 1960's (App. p. 90); and the Court of Appeals did not reverse this finding, despite the Respondents' urging. The sole finding as to faculty reversed by the Court of Appeals was the District Court's conclusion that discrimination in faculty assignment ended as of the early 1960's. This finding was not reversed on the ground that the District Court's conclusion was clearly erroneous under Rule 52 of the Federal Rules of Civil Procedure. Rather, the Court of Appeals reversed because it held that the District Court erred as a matter of law in failing to apply the foreseeable effects standard to the evidence on faculty assignment after the early 1960's (App. pp. 106-110, 110-113). Therefore, any evidence concerning discrimination in assignment of faculty after the early 1960's is indicative of overall segregative intent only if the foreseeable effects standard is itself proper under the Fourteenth Amendment. And any evidence on dis-

crimination in the hiring of black faculty should have no bearing whatsoever on the existence of segregative intent because neither court below was persuaded by this evidence. Therefore, this evidence on faculty policies cited by the Respondent Intervenors is not in any way indicative of overall segregative intent, independent of the validity of the Court of Appeals' legal standard.

5. The Respondent United States urges, as it did the last time this Court considered this case, that the District Court erred as a matter of law in not considering the "cumulative effect" of all of the evidence of intentional segregation in the record. This assertion clearly mischaracterizes what the District Court in fact did since the District Court, by the express terms of its opinion, clearly examined all of the evidence individually and collectively (App. p. 97). Moreover, the Respondent United States advanced this argument on remand in the Court of Appeals, and the Court of Appeals did not give any indication that it considered the argument meritorious.

6. Both Respondents assert that the Court of Appeals in its original opinion engaged in a sensitive inquiry into the evidence in the record in applying the foreseeable effects standard. However, no such care was taken, as is illustrated by briefly considering its treatment of the one policy which arguably could have had system-wide effects on the racial composition of the schools: school construction.

In analyzing the evidence on school construction, the Court of Appeals held that the Respondents met their burden of proof simply by showing that 37 of 39 new

schools or additions which were constructed by the School District between 1951 and 1973 opened either predominantly black or predominantly white (App. pp. 123-24). In only one of these instances was school siting ever an issue in the District Court (Martin Luther King Middle School). Thus, the finding of intentional segregation with respect to 36 of these 39 schools is based solely on evidence of their de facto racial composition at the time they opened. There was no evidence whatsoever that any of these schools could have opened on a more integrated basis had alternate sites for school construction been available and utilized or had alternate attendance boundaries been drawn. The Court of Appeals simply did not require any kind of evidence from the Respondents except evidence of racial composition at the time the schools opened. Such evidence alone was sufficient for the Court of Appeals to apply its foreseeable effects standard and obtain its legal conclusion.

D. Recent Court Of Appeals Decisions Do Not Obviate The Necessity For Review By This Court.

Both Respondents urge that further review is unnecessary in this case because the Circuit Courts which have considered the question raised in this Petition since this Court decided *Village of Arlington Heights* are all in agreement that the foreseeable effects standard is consistent with *Village of Arlington Heights.* The Respondents are correct that all three of the Circuit Courts which have considered this question since this Court's decision in *Village of Arlington Heights* are in such agree-

ment.[2] However, this unanimity, coupled with earlier use of the foreseeable effects standard by two other Circuits,[3] simply indicates that the error of the Eighth Circuit is compounding itself and that only plenary consideration of this case by this Court can properly resolve this issue and achieve a uniform and consistent application of the Fourteenth Amendment to all cases arising under it.

CONCLUSION

Despite over two decades of school desegregation litigation, this Court has yet to directly consider the most fundamental question in such litigation: what kind of evidence is necessary and what burdens of proof are appropriate for a court properly to find intent to segregate in the first instance. Moreover, this Court has not yet explicitly decided the question of the appropriateness of the foreseeable effects standard for determining intentional discrimination in any context under the Fourteenth Amendment. These vital questions form the issue presented by this Petition. It is appropriate for this Court

2. *United States v. School District of Omaha*, 565 F. 2d 127 (8th Cir. 1977); *United States v. Texas Education Agency*, 564 F. 2d 162 (5th Cir. 1977); *NAACP v. Lansing Board of Education*, 559 F. 2d 1042 (6th Cir.), *cert. denied*, 46 U. S. L. W. 3390 (December 13, 1977).

3. *Hart v. The Community School Board of Education, New York School District No. 21*, 512 F. 2d 37 (2nd Cir. 1975); *Morgan v. Kerrigan*, 509 F. 2d 580 (1st Cir. 1974), *cert. denied*, 421 U. S. 963 (1975).

to address these questions in this case because their resolution is determinative of the outcome of this litigation which deeply affects the lives of thousands of innocent children and parents and because their resolution by the Court of Appeals dramatically and improperly expanded the power of the federal courts to dislodge the decision-making authority of the states and their political subdivisions. *Village of Arlington Heights* makes it clear that the Court of Appeals for the Eighth Circuit has incorrectly decided these questions. The continued reliance by several Circuits on the foreseeable effects standard demonstrates that proper resolution of these questions will not occur unless this Court directly addresses the issue raised here. Accordingly, this Petition should be granted forthwith and the judgment of the Court of Appeals reversed.

Respectfully submitted,

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